FILED
JAN 29 1992
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(3)

No. 91-888

In the Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL A. WERME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the indictment charging petitioner with conspiring to violate the Travel Act set forth a sufficient description of the crime petitioner was charged with committing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 939 F.2d 108.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1991. A petition for rehearing was denied on August 27, 1991. The petition for a writ of certiorari was filed on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiracy, in

violation of 18 U.S.C. 371, and one count of violating the Travel Act, 18 U.S.C. 1952(a)(3). The district court subsequently granted a judgment of acquittal on the substantive count. See Pet. App. 45. Petitioner was given a suspended sentence of three years' imprisonment and five years' probation on the conspiracy count. *Id.* at 4.

The evidence at trial showed that United Engineers and Constructors, which is based in Philadelphia, was the prime contractor on the Seabrook Nuclear Power Plant construction project in New Hampshire. Petitioner was the president of a company with a Texas subsidiary that sought to be a subcontractor on the project. On four different occasions, petitioner paid the prime contractor's Chief Buyer for confidential information relating to competing bids to install insulation at the plant. Pet. App. 2-4.

On appeal, petitioner argued that the count charging him with conspiring to violate the Travel Act was insufficient. The court of appeals rejected that claim. Pet. App. 5-10. The court noted that when reviewing the sufficiency of an indictment, it looks at the entire instrument to determine "(1) whether the indictment contains the elements of the offense intended to be charged and sufficiently appraises [*sic*] the defendant of [the crime] he should be prepared to meet; [and] (2) whether the indictment is specific enough to make a plea of double jeopardy possible." *Id.* at 6, quoting *United States* v. *Wander*, 601 F.2d 1251, 1258 (3d Cir. 1979). The court added that an indictment charging a conspiracy under 18 U.S.C. 371 need not specifically plead all of the elements of the underlying substantive offense. The court explained that "[i]n a conspiracy count, the conspiracy is the gist of the offense . . . [and the indictment] need not plead the

substantive offense letter-perfect because the purpose of the conspiracy may have been accomplished even though such activity fell short of completing a substantive offense." Pet. App. 7. The indictment at issue was sufficient, the court held, to put petitioner on notice of the offense charged and to provide him with double jeopardy protection. *Id.* at 9-10.

ARGUMENT

Petitioner concedes, Pet. 7, that the court of appeals stated the correct legal test for determining the sufficiency of the indictment, but quarrels with the application of that standard in this case. That fact-bound claim does not warrant review by this Court.

This Court has long held that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States* v. *Bailey*, 444 U.S. 394, 414 (1980), quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). See *Russell* v. *United States*, 369 U.S. 749, 736-764 (1962); *United States* v. *Debrow*, 346 U.S. 374, 376 (1953); *Hagner* v. *United States*, 285 U.S. 427, 431 (1932).

In a conspiracy count the elements of the underlying substantive offense need not be pleaded with the specificity required when the charge is the actual commission of the substantive offense. This Court long ago stated that "[i]t is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which

is the object of the conspiracy * * * or to state such object with the detail which would be required in an indictment for committing the substantive offense." *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927); *Williamson* v. *United States*, 207 U.S. 425, 447 (1908) (where an indictment alleges conspiracy, "certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required in stating the object of the conspiracy"). Accord *United States* v. *Reynolds*, 762 F.2d 489, 494 (6th Cir. 1985) (charging conspiracy to commit mail fraud); *United States* v. *Perkins*, 748 F.2d 1519, 1524-1525 (11th Cir. 1984) (charging conspiracy to obstruct justice); *United States* v. *Graves*, 669 F.2d 964, 968 (5th Cir. 1982) (charging conspiracy to violate the Dyer Act); *United States* v. *Clark*, 649 F.2d 534, 539 (7th Cir. 1981) (charging conspiracy to commit mail fraud). That is because "[t]he gist of the offense of conspiracy" is not the commission of the elements of the underlying offense, but rather the "agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Falcone*, 311 U.S. 205, 210 (1940). And the jury in a conspiracy case is not required to find the elements of the underlying substantive offense. The jury must simply find a "conspiracy, agreement, or understanding" to commit that substantive offense, along with an overt act. See 2. E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions (Criminal)* § 28.03 (4th ed. 1990).

The indictment in this case was more than sufficient under those standards. It described a conspiracy "from at least January 1983 to and including April 19, 1984," in "the Eastern District of Pennsylvania

and elsewhere," to violate Section 1952(a)(3) by obtaining "bids containing confidential information" from competitors on the Seabrook project in return for "money and other things of value" paid to the prime contractor's Chief Buyer. Pet. App. 52. It was further alleged that petitioner and his co-defendant intended to use the confidential bid information to prepare the subsidiary's bid, assuring that the subsidiary would unlawfully obtain the subcontract to do the insulation work. *Id.* at 53. The indictment also alleged, as overt acts, that petitioner and his co-defendant traveled in interstate commerce on various occasions to obtain copies of bids received by the prime contractor from the subsidiary's competitors. *Id.* at 53-54.

The indictment thus alleged the elements of a violation of Section 371, *i.e.*, petitioner's knowing and deliberate participation in an agreement to commit an offense against the United States, and the commission of overt acts in furtherance of the agreement. Furthermore, the scope and duration of the conspiracy were clearly set forth in the indictment, thus informing petitioner of the charges against him and putting him in a position to plead double jeopardy as a bar to further prosecution for the same offense. The indictment not only described the nature of the agreement, but specified three actual instances of interstate travel in furtherance of that agreement. See Pet. App. 53-54.

Petitioner disagrees, Pet. 15, with the court of appeals' conclusion that "the paragraphs set forth in the Plan and Purpose section of the conspiracy count * * * clearly reveal that [petitioner] is charged with conspiracy to promote *commercial bribery* through interstate activity," Pet. App. 8 n.1. Contrary to petitioner's allegation, those three paragraphs, fairly

read, set forth the charge. Although the paragraphs do not include "the words 'bribe', 'commercial bribery', 'interstate', 'travel', or 'use of interstate facilities'," Pet. 15, they plainly allege that petitioner, on behalf of a Texas subsidiary, obtained confidential bids from a Pennsylvania contractor concerning a project in New Hampshire by making payments to the contractor's Chief Buyer, and that the purpose of the scheme was to obtain a subcontract unlawfully.

Petitioner claims that the indictment would be sufficient if the allegations of interstate travel that are alleged as overt acts in paragraph 12 of the indictment had been included in the prior section describing the plan and purpose of the conspiracy, but he contends that his conviction must be reversed because they were not. Pet. 16. We agree with the court of appeals that the plan and purpose section of the indictment adequately set out the essence of the conspiracy charge. But reversal of petitioner's conviction would not be warranted in any event; even if the allegations of interstate travel that were included as overt acts should have been set out in the plan and purpose section of the indictment, petitioner could not have been prejudiced by that technical pleading error.

Review is not warranted on account of petitioner's claims of a conflict in the circuits. Petitioner cites three cases in support of his contention that the allegations in the overt acts paragraph of an indictment may not be used to remedy an insufficiency in the charging section. Pet. 16. In each of those cases, however, the court of appeals affirmed the conspiracy conviction at issue. *United States* v. *Wander*, 601 F.2d 1251, 1259-1260 (3d Cir. 1979); *United States* v. *Pheaster*, 544 F.2d 353, 359-363 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); *United States* v.

Knox Coal Co., 347 F.2d 33, 37-39 (3d Cir.), cert. denied, 382 U.S. 904 (1965). Moreover, two of those cases, like this case, were decided by the Third Circuit. In addition, the case that petitioner claims, Pet. 19, to be "absolutely indistinguishable" from this case, *United States* v. *Hooker*, 841 F.2d 1225 (4th Cir. 1988), is distinguishable on the ground given by the court of appeals, Pet. App. 9 n.2. The indictment in *Hooker* failed even to allude to the requirement that a RICO enterprise have an effect on interstate commerce. But the indictment in this case described the interstate nature of petitioner's conspiracy, both in the plan and purpose section of the indictment and in the overt acts section. Review by this Court is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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